



FILED

Jul 18 2008, 9:58 am

Kevin L. Smith

CLERK
of the supreme court,
court of appeals and
tax court

ATTORNEY FOR APPELLEE:

JAMES D. JOHNSON
Rudolph, Fine, Porter & Johnson, LLP
Evansville, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

RALPH D. MILLSAPS, M.D., and
 JULIO A. MORERA, M.D.,
 Appellants-Defendants,
 vs.
 OHIO VALLEY HEARTCARE, INC.,
 Appellee-Plaintiff.

No. 87A01-0803-CV-140

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert R. Alyswoth, Judge
Cause No. 87D02-0604-PL-159

July 18, 2008

MEMORANDUM DECISION- NOT FOR PUBLICATION

BAKER, Chief Judge

Appellants-defendants Ralph D. Millsaps, M.D., and Julio A. Morera, M.D. (collectively, the appellants), appeal the trial court's order entering summary judgment in favor of appellee-plaintiff Ohio Valley Heartcare, Inc. (OVHC), on OVHC's complaint against the appellants for breach of contract. The appellants argue, among other things, that the trial court erroneously enforced a contract against them to which they were not a party.

Finding that the trial court properly concluded that the appellants are bound to the terms of a contract that they executed but erroneously calculated the amount that they owe pursuant to a different contract to which they are not a party, and finding that this court's determination in a prior appeal of the same parties may affect the amount owed by the appellants to OVHC, we affirm in part, reverse in part, and remand with instructions contained herein.

FACTS

These parties have been before us before. As we explained in our earlier opinion,

OVHC is a cardiovascular medical practice with its primary location in Evansville. It employs physicians who provide cardiovascular medical services to OVHC's patients. Millsaps is one of two interventional cardiologists who founded OVHC; Morera was hired in 1991 as the practice's only pediatric cardiologist. Millsaps and Morera were directors, shareholders, and employees of OVHC.

Millsaps v. Ohio Valley Heartcare, Inc., 863 N.E.2d 1265, 1267 (Ind. Ct. App. 2007)

(Millsaps I), trans. denied. In 2004 and 2005, OVHC

failed to process nearly \$2 million in patient billings, some of which were over two years old. This revelation resulted in the resignation or termination of OVHC's CEO, CFO, and billing chief, an increase in overhead to a monthly high of 83%, a reduction in physician compensation, inability to pay existing indebtedness, and an advisement from OVHC's accountant that the company was insolvent.

Id. “During the six-month period ending on December 31, 2005, eight of seventeen physicians, including Millsaps and Morera, resigned from OVHC.” Id. In Millsaps I, we found that OVHC was not entitled to enforce the agreement not to compete contained within the parties’ employment agreement against the appellants. We based this conclusion on OVHC’s prior material breach of the employment agreement by failing to provide timely and competent billing and collection services. Id. at 1272.

On January 1, 2004, the shareholders and directors of OVHC, including the appellants, executed an Inter-Doctor Letter Agreement (the 2004 IDLA), the purpose of which was to address and define the shareholders’ income sharing arrangements. OVHC was not a party to the agreement.

On September 9, 2005, after the appellants had resigned from OVHC, eight remaining shareholders executed a new IDLA (the 2005 IDLA) effective as of January 1, 2005. The appellants were not parties to and were unaware of the 2005 IDLA at the time of its execution. According to the appellants, “[t]he 2005 IDLA contained new and different terms for calculating ‘net income’ compensation than did the 2004 IDLA.” Appellant’s Br. p. 4.

At some point after the appellants resigned, OVHC made a final calculation of their respective “net income” based on the terms and formula contained in the 2005 IDLA. OVHC determined that Millsaps was overdrawn by \$85,977 and that Morera was overdrawn by \$25,969. On February 13, 2006, OVHC sent a demand to the appellants to pay the amounts allegedly owed to OVHC. The appellants neither contested the amount owed nor repaid it to OVHC.

On May 3, 2006, OVHC filed a complaint against the appellants for breach of contract stemming from their failure to pay the amounts allegedly owed pursuant to the 2005 IDLA calculations. On January 25, 2007, OVHC filed a motion for summary judgment, and on March 23, 2007, the appellants responded and filed a cross-motion for summary judgment. Following a November 13, 2007, hearing,¹ the trial court granted OVHC's summary judgment motion and denied the appellants' cross-motion, finding in pertinent part as follows:

3. The 2004 [IDLA] was executed by all ten shareholders and directors of OVHC, and to be effective January 1, 2004.
4. The 2005 IDLA was signed by eight of the ten after both Millsaps and Morera submitted their resignation notices in September, 2005, each to be effective in November, 2005, and the 2005 IDLA was neither presented to [n]or seen by Millsaps or Morera prior to their separation from OVHC in November, 2005. The 2005 IDLA was made effective as of January 1, 2005.
5. The 2005 IDLA approved and executed by eight of the ten shareholders and directors of OVHC was not an amendment of the 2004 IDLA executed by all ten of the shareholders and directors of OVHC. Millsaps' and Morera's rights and liabilities are neither controlled [n]or affected by the 2005 IDLA, as they were not contracting parties to this agreement.
6. . . . [T]he revocation of the 2004 IDLA as to Millsaps and Morera could not be effective, as they had no notice that their 2004 IDLA had been revoked and terminated, and Millsaps and Morera therefore continued to perform services until their termination dates in November, 2005, under the 2004 IDLA. The revocation of the 2004 IDLA was ineffective as to Millsaps and Morera, since they were given no notice of the termination of the contract, and they continued to perform their services, to their knowledge, under the

¹ The proceedings herein had been stayed for a period of time while the parties and the court awaited the outcome of Millsaps I.

2004 agreement. Even if one party to a contract may unilaterally terminate that contract, the termination is ineffective to the other party who continues to perform under what that party continues to believe is a valid and binding contract. In reality, that is what occurred in this matter.

7. Nevertheless, the 2004 IDLA states in relevant part as follows, to wit:

In the event of termination, the date of termination shall be considered the last day of the fiscal year and Corporation shall be caused to make a final calculation of the terminated physician's share of "net income" payable to the terminated physician for said year within ninety (90) days after the termination date. . . . In the event said final calculation reveals that the terminated physician's share of "net income" for said year is less than the amounts paid to or credited for the terminated physician during said year, the terminated physician shall pay the amount of any such deficiency to the Corporation within the thirty (30) days following said final calculation.

8. The 2004 IDLA further provides that the stockholder who disagreed with the Corporation's determinations and calculations could engage an independent accountant, and the Corporation could do the same. If the accountants agreed, their calculations would determine the issue between the stockholder and the Corporation. If the accountants did not agree, they would select a third independent accountant whose calculations would be final and binding upon both the shareholder and the Corporation.
9. OVHC has standing to assert the claims for overpaid compensation made against Millsaps and Morera under the 2004 IDLA agreement either as a third party beneficiary of their agreement, or [because] the agreement effectively appoints the Corporation as the agent of the shareholders and directors seeking to recover overpaid compensation from one or more of the other shareholders executing the 2004 agreement.
10. . . . The determination and judgment entered in [Millsaps I] does [sic] not constitute a bar to the claims asserted by OVHC here against Millsaps and Morera in this cause.

11. The 2004 IDLA is not ambiguous and, under the undisputed evidence before the court, is enforceable by the plaintiff OVHC against the defendants Millsaps and Morera to the extent of those sums set forth [in the February 13, 2006, demand letter, namely,] \$25,969.00 from Morera and \$85,977.00 from Millsaps . . . , and not any larger amounts which otherwise might be due under the 2004 IDLA agreement, assuming that OVHC's allegation that the defendants' income positions under the 2005 IDLA were better than under the 2004 letter agreement is in fact true. OVHC's right of recovery against Millsaps and Morera is therefore limited to the amounts timely demanded pursuant to the contract between these parties, and may not be increased or recalculated under the IDLA 2004 formula. . . .

13. The designated evidentiary matter shows there is no genuine issue as to any material fact and that OVHC is entitled to a judgment as a matter of law. The plaintiff's motion for summary judgment is therefore granted. The defendants' motion for summary judgment is accordingly denied.

Appellants' App. p. 8-10. The appellants now appeal.

DISCUSSION AND DECISION

I. Standard of Review

As we consider the appellants' argument that the trial court erroneously entered summary judgment in OVHC's favor and refused to enter summary judgment in the appellants' favor, we note that summary judgment is appropriate only if the pleadings and evidence considered by the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 909 (Ind. 2001); see also Ind. Trial Rule 56(C). On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Owens Corning, 754 N.E.2d at 909.

Additionally, all facts and reasonable inferences from those facts are construed in favor of the nonmoving party. Id. If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper. Id.

An appellate court faces the same issues that were before the trial court and follows the same process. Id. at 908. The party appealing from a summary judgment decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous. Id. When a trial court grants summary judgment, we carefully scrutinize that determination to ensure that a party was not improperly prevented from having his or her day in court. Id.

II. The 2005 IDLA

The remaining OVHC shareholders executed the 2005 IDLA after the effective date of the appellants' respective resignations from OVHC. The appellants were not privy to the negotiations surrounding or the execution of this agreement and had no notice of its existence. Consequently, the trial court properly concluded that OVHC may not enforce the 2005 IDLA against the appellants.

Logically following that conclusion, however, is a similar conclusion that OVHC is not entitled to calculate the amount, if any, owed by the appellants pursuant to the 2005 IDLA. It is undisputed that the amount of the judgment entered by the trial court against the appellants was reached by applying the terms of the 2005 IDLA, which is erroneous because the appellants were not parties to that agreement. We find, therefore, that the amount of the appellants' overdrafts may not be calculated by applying the terms of the 2005 IDLA.

III. The 2004 IDLA

The appellants next argue that OVHC is not entitled to enforce the 2004 IDLA against them either even though they were concededly parties to that agreement. They first argue that because OVHC failed to make a final calculation of “net income” pursuant to the 2004 IDLA within ninety days of their resignation as provided by the agreement, OVHC has waived any claim for payment. We cannot agree with this hyper-technical application of the agreement, which is an evident attempt to play and win “the latest version of ‘Legal Gotcha’[.]” Wilson Fertilizer & Grain, Inc. v. ADM Milling Co., 654 N.E.2d 848, 856 (Ind. Ct. App. 1995) (Kirsch, J., concurring and dissenting); see also Wolfe v. Wolfe, 793 N.E.2d 1164, 1169 (Ind. Ct. App. 2003) (condemning “gotcha” litigation tactics) (Baker, J., concurring). We find that although OVHC is not permitted to enforce the terms of the 2005 IDLA against the appellants, its good faith calculation of their overdrawn shares pursuant to the terms of that agreement sufficed to avoid waiver of its ability to do the same pursuant to the 2004 IDLA.²

Next, the appellants argue that the 2005 IDLA revoked the 2004 IDLA such that OVHC is no longer entitled to enforce the 2004 IDLA at all. This argument is a similar form-over-substance charade that we will not countenance, inasmuch as its end result would be to hold the appellants entirely unaccountable for nearly all of 2005. As put by OVHC,

² Similarly, however, OVHC’s argument that the appellants have waived any right to contest the amount by which they are overdrawn because they did not comply with the relevant contractual challenge provisions must fail. In making its demand on the appellants, OVHC applied the 2005 IDLA. Faced with a choice of challenging the calculation pursuant to the 2005 IDLA, to which they were not a party, or the 2004 IDLA,

“the 2005 IDLA does not, by its terms, relieve the [appellants] of their obligations pursuant to the 2004 IDLA. If it were otherwise, the [appellants] would not be entitled to any compensation in 2005, because they would not have been working under IDLA agreement.” Appellee’s Br. p. 12. Inasmuch as the appellants have reaped the benefits of the 2004 IDLA, they are also bound to its requirements, specifically, the repayment of their overdrawn shares, if any. See Mitchell v. Universal Solutions of N. Carolina, Inc., 853 N.E.2d 953, 959 (Ind. Ct. App. 2006) (holding that a party may not accept benefits under a contract and simultaneously repudiate its obligations), trans. denied.

Even accepting for argument’s sake that the execution of the 2005 IDLA revoked the 2004 IDLA, we have already found that the execution of the 2005 IDLA was ineffective as to the appellants, and the logical corollary is that the revocation of the 2004 IDLA was similarly ineffective. Consequently, the appellants continued to practice pursuant to the terms of the 2004 IDLA during 2005 and OVHC may, in fact, enforce the 2004 IDLA against them. That said, as noted above, the trial court improperly permitted OVHC to calculate the appellants’ overdrawn shares pursuant to the terms of the 2005 IDLA. We remand, therefore, with instructions to apply the terms of the 2004 IDLA to calculate how much is owed by the appellants to OVHC, if any.

Finally, the appellants argue that our determination in Millsaps I bars OVHC’s breach of contract claim against them. The Millsaps I court concluded that OVHC had committed a

which OVHC had not applied in making its calculation, the appellants’ decision to do neither cannot be held against them.

prior material breach of the parties' employment agreement and could not, therefore, enforce the agreement against the appellants. 863 N.E.2d at 1270-72. Specifically, OVHC "failed to process nearly \$2 million in patient billings, some of which were over two years old." Id. at 1267. The appellants first contend that OVHC's failure to provide timely and competent billing and collection services also constitutes a material breach of the 2004 IDLA, but we cannot agree. OVHC was not a party to that agreement and could not, therefore, have breached it.³

Furthermore, the appellants argue that OVHC's prior material breach of the employment agreement precludes its ability to enforce the 2004 IDLA. Their sole source of support for this argument is the fact that the IDLA references the employment agreement.

Specifically, the 2004 IDLA states as follows:

Other aspects of the relationship between [OVHC] and [the shareholders] are set forth in other documents, including [OVHC's] Employment Agreements This letter neither invalidates nor supersedes any such documents, whether executed before or after this date, except that if any of those provisions are inconsistent with undertakings of this agreement, then this agreement shall prevail upon each of you personally.

Appellants' App. p. 22. We simply cannot see how the mere fact that the IDLA references the employment agreement means that OVHC's breach of the latter agreement precludes its enforcement of the former. Indeed, the language above shows the shareholders' intent that their obligations under the 2004 IDLA be paramount to all other agreements affecting their

³ The trial court found that OVHC is entitled to enforce the 2004 IDLA against the appellants as the third-party beneficiary to that agreement or the agent of the shareholders. The appellants do not appeal that portion of the trial court's order.

relationships to one another and OVHC. Therefore, we do not find that the fact that OVHC breached the employment agreement prevents it from enforcing the terms of the 2004 IDLA against the appellants.

That said, we note that the Millsaps I court also considered OVHC's argument regarding the appellants' overdrawn shares:

OVHC argues that the appellants contributed to the company's financial situation by overdrawing their shares, insisting that "[w]ithout the physician overdraws OVHC would have been profitable" during the relevant period of time. Appellee's Br. p. 32. The appellants insist, however, that if OVHC had timely and adequately billed and collected the nearly \$2 million in lost receivables, physicians would not have been overdrawn, draws would not have had to have been lowered, and additional debt would not have to have been incurred. Indeed, OVHC presented no evidence that the draws of any physician in 2005 were any different than they had been for the prior fifteen years.

863 N.E.2d at 1272. The parties and the trial court must consider whether—and, if so, to what extent—OVHC's failure to timely and adequately bill and collect the \$2 million in lost receivables affected the amount by which the appellants are overdrawn. The appellants should not be penalized for OVHC's "disastrous errors[.]" Id. at 1271. Therefore, we remand with instructions to apply the terms of the 2004 IDLA, taking into account the \$2 million in lost receivables, to determine the amount owed by the appellants to OVHC, if any.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions.

RILEY, J., and ROBB, J., concur.